IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-715

STATE OF ALABAMA AND
CHARLES A. GRADDICK, ATTORNEY GENERAL,

Petitioners,

v.

DARRYL PRUITT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
(BEFORE FINAL JUDGMENT)

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE ISSUES

I. Does the Court have jurisdiction?

II. Would it be improvident for the Court to grant certiorari in advance of judgment in the court of appeals when that court may obviate the need for a constitutional decision by ruling on non-constitutional grounds not presented in the petition?

III. Are there any circumstances that justify the extraordinary departure from normal appellate practice sought by petitioners?

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Respondents argue that the Court lacks jurisdiction to hear a petition for certiorari filed by the State of Alabama and its Attorney General, who have intervened in this suit pursuant to 28 U.S.C. §2403(b), because the parties between whom there is an Article III controversy have not sought review in this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

In an opinion dated June 12, 1984, a copy of which is set forth in Appendix A to the petition,[1] the district court found unconstitutional the City of Montgomery's

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[1]Citations to the appendices to the petition for a writ of certiorari are in the form of App.___. Citations to the record below are to the record in the U.S. Court of Appeals for the Eleventh Circuit, which by order has been retained in the district court for the use of the parties.

policy governing the use of deadly force to arrest nondangerous suspected felons. The district court's decision is supported by the Fourth and Fourteenth Amendments to the U.S. Constitution.

STATUTORY PROVISIONS INVOLVED

One of the issues presented in the appeal below is the constitutionality of the City of Montgomery's policy governing the use of deadly force to arrest nondangerous suspected felons. This policy is taken from Alabama Code §13A-3-27 (1975), a codification of the common law rule that a law enforcement officer may use deadly force as a last resort to arrest a fleeing suspected felon. A copy of the statute is set out in Appendix B to the petition.

Also involved here is 28 U.S.C. §2403(b), which provides:

"In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

STATEMENT OF THE CASE

On August 26, 1983, respondent filed in the U.S. District Court for the Middle District of Alabama a complaint for damages alleging that he had been shot and partially paralyzed by a City of Montgomery police officer in violation of

federal and state law. (R. 11-17). The complaint named as defendants: former police officer Lester Kidd, the officer who had fired at respondent while attempting to arrest him; the City of Montgomery; and the mayor and police chief of the City. (Id.). Respondent later voluntarily dismissed both the mayor and the police chief from the suit. (R. 55-57).

Respondent's first claim was that former police officer Kidd had shot him in violation of Alabama law, which permits a police officer to use deadly force to effect an arrest only as a last resort. In addition, repondent claimed that the City of Montgomery's policy governing the use of deadly force, pursuant to which Kidd shot respondent, is unconstitutional because it permits officers to shoot suspected felons whom the police do not believe to be dangerous. (R. 11-17).

On May 17, 1984, respondent moved for partial summary judgment against the City of Montgomery. (R. 64-72). In his motion, respondent argued that former officer Kidd was acting pursuant to the City of Montgomery's unconstitutional policy governing the use of deadly force when he shot respondent and that the City was therefore liable to respondent as a matter of law. (Id.) In its response to the motion, the City acknowledged that officer Kidd had acted pursuant to City policy, but denied that the policy was unconstitutional. (R. 85-89).

The district court granted respondent's motion for summary judgment on June 12, 1984. (R. 90-95). The court held that it is unconstitutional for police officers to use deadly force to arrest a suspected felon whom the police do not reasonably believe to be

dangerous.[2] The court found as a matter of undisputed fact that:

> Officer Kidd's testimony about the shooting is clear and straightforward and permits only one reasonable conclusion: Kidd shot Pruitt to prevent him from escaping arrest, and not because he posed a danger of death or bodily injury to anyone.

(R. 93; App. 7). Thus, the Court held that "Kidd's use of deadly force under these circumstances did not meet the [constitutional] standard and, therefore, violated Pruitt's civil rights." (R. 93; App. 8).

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[2] The court wrote that "the use of deadly force to stop a fleeing or escaping felon constitute[s] a civil rights violation actionable under §1983 'unless the [law enforcement] official has good reason to believe that the use of such force is necessary to prevent imminent, or at least a substantial likelihood of, death or great bodily injury.'" (citing Ayler v. Hopper, 532 F.Supp. 198, 201 (M.D. Ala. 1981)). (R. 92; App. 5-7).

The City of Montgomery asked the district court to certify for interlocutory appeal, pursuant to 28 U.S.C. §1292(b), the question of the lawfulness of its deadly force policy. The court declined to do so, and on July 27, 1984, the parties tried to a jury the issue of compensatory damages for respondent's injuries. (R. 6). The jury returned a verdict of $100,000. (R. 211). Pursuant to Rule 54(a), Fed.R.Civ.P., the court entered a judgment against the City on the basis of the jury's verdict. (R. 212).

On August 23, 1984, the City appealed. (R. 224). Respondent moved for a stay of proceedings on appeal pending the decision of this Court in Tennessee v. Garner, Nos. 83-1035, 83-1070 (argued

Oct. 30, 1984).[3] The stay was denied.[4] The State of Alabama and its Attorney General, Charles Graddick, moved to intervene in the appeal, pursuant to 28 U.S.C. §2403. Their motion was granted on October 9, 1984. The State and Attorney General Graddick then filed in this Court a petition for a writ of certiorari before judgment in the court of appeals. The City of Montgomery neither joined the petition nor filed such a petition itself.[5]

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[3] The record of proceedings in the court of appeals has not been compiled. Therefore, this statement cannot refer to that record.

[4] Respondent's motion for a stay was denied on November 2, 1984, after the petition for a writ of certiorari was filed.

[5] The City's brief on the merits for the court of appeals is due on December 12, 1984.

STATEMENT OF THE FACTS

On the evening of September 1, 1982, Darryl Pruitt, an 18-year-old black man, and four of his friends, two young men and two young women, walked to a commercial area on Fairview Avenue in Montgomery, Alabama. (P. 6, 14-15).[6] He and one of the young women, Sharon Brown, went together behind 614 W. Fairview Avenue, where they engaged in sexual intercourse. (P. 18). Darryl believed that Sharon, who was already the mother of a young child, was 17; he later heard that she was "something like 15, 16". (P. 16). After their sexual encounter, while Darryl was leaving the area behind 614 W. Fairview Avenue, a patrol car arrived on the scene.

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[6]This statement of facts relies primarily on the depositions of respondent and former officer Kidd. Citations to respondent's deposition are in the form of P.__. Citations to Kidd's deposition are in the form of K.__.

(P. 19). Apparently, a citizen who had heard noises behind 614 W. Fairview Avenue had reported to the police a possible burglary in progress. (Pl. Ex. 6; R. 77).[7] The citizen had told the police that three young black males were involved. (K. 16).

There were two officers in the patrol car. (K. 15). As their car approached the scene, the senior officer let the junior police officer, Lester Kidd, out on an intersecting street. (K. 15-16, 29.) Kidd, who had just completed his period of probationary employment with the Montgomery police department, was armed with, among other weapons, a billy club

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[7]Citations in the form of Pl. Ex.__ are to the exhibits to the depositions taken below. Citations in the form of Tr.__ are to the transcript of the trial on damages.

and a shotgun. (K. 9, 51). Kidd walked toward the rear of 614 W. Fairview while the senior officer pulled around to the front of the building. (K. 15- 17, 51). Kidd carried a walkie-talkie and was in continuous radio contact with both his senior officer and other patrol cars that, in accordance with standard procedure, were converging on the scene in order to secure the area. (K. 18, 21-23, 27-28, 30-31).

According to former officer Kidd's deposition, Kidd was familiar with the area behind 614 W. Fairview, which was wooded and overgrown. (K. 17). As Kidd approached the back of 614 W. Fairview, his senior officer reported on the walkie-talkie that he had two suspects in custody at the front of the building. (Id.). Kidd walked two or three steps and then Darryl Pruitt "came out of [some] bushes." (K.

18-19, 33). Darryl was very close to Kidd at the time. (K. 33). Kidd testified that he believed Darryl was the third of the three youths suspected of burglarizing 614 W. Fairview Avenue. (K. 19, 30-31). Just as he saw Darryl, Kidd heard a second patrol car pull up out front. (K. 24). Within seconds, he heard another patrol car arrive at the same location. (K. 25). Kidd did not know whether other patrol cars had arrived on any of the streets that bordered the area behind 614 W. Fairview, including the street on which Kidd had been let off. (K. 31-32).

When Darryl came down the path toward Kidd, Kidd raised his shotgun to a high port position. (K. 19). Kidd, who had a good view of Darryl, thought that he was a "young black male... in his teens." (K. 33-35). He saw that Darryl was dressed in a light-colored T-shirt, dark trousers, and tennis shoes, and observed no weapons

in his possession. (K. 33-34, 38). Darryl then took "about three steps" toward Kidd, "veered off to the right," and ran away "like he was O.J. Simpson." (K. 39). Kidd described what happened next as follows:

> At this time I was thinking this was the third subject that was involved in the burglary coming from the back. I knew the subject had to have been looking at me because I didn't hear anything until I more or less ran up on this bush. When I got too close, he jumped out.
>
> ... the subject came at me and veered off to the right. I said, "Halt, police." The subject kept running. I yelled, "Halt, police" again... Then I yelled a third time and the subject went down into a ditch. And when he came up out of the ditch I had to make a decision whether I was going to stop this fleeing felon or what I was going to do.
>
> ... And I shot the first round and the subject kept moving, and I shot the second round and ... I heard the subject yell and he fell.

(K. 19-20). At his deposition, Kidd offered:

> I guess he was waiting for me to walk by and then he was going to be gone. But I must have walked straight into his path. I boxed him in.
>
> Q. He had to go around you to get out?
>
> A. (Witness nods head in the affirmative.)

(K. 41-42).

Kidd did not use his walkie-talkie to inform his senior officer or the other patrol cars on the scene that he had spotted Darryl (K. 34), nor did he see Sharon Brown, Darryl's sexual partner, before he shot (K. 62). Kidd knew that it was proper to arrest fleeing suspects in like circumstances by calling in other units to cut off the suspect's avenues of escape. (K. 21-24, 27-28, 42-44).

Darryl's body was raked by buckshot. (P. 20, 38-39; Tr. 111-112). He was treated on the scene by emergency medical technicians and then taken to a hospital, where he remained for over 6 weeks. (K.

22, 25-26; Tr. 75). It was over a year before he was able to walk again (K. 27), a feat he finally accomplished after being fitted with a leg brace. (Tr. 79, 92, 120). His right leg is permanently paralyzed. (Tr. 80, 90).

After the shooting, Kidd wrote out a narrative account of his version of the incident. (K. 64-65). The narrative, which the City claims has been lost, was not produced in discovery. A statement was also taken from Kidd by an investigator from the Montgomery County Sheriff's Department. (K. 66; Pl. Ex. 1). In that statement, Kidd made no mention of either Darryl's coming "out of the bushes" or Darryl's coming "at" him. (Pl. Ex. 1).

When asked at his deposition why he shot Darryl, Kidd stated that:

> At the time I shot Darryl Pruitt my thinking was that he was a fleeing felon coming from a burglary; that he also had made an attempt to physically harm a

> police officer but he avoided that attempt and he was a subject that I felt needed to be stopped.

(K. 84). The "attempt to ... harm a police officer" to which Kidd referred was the incident in which Darryl had come out of the bushes and come "at" Kidd. (K. 40). According to Kidd:

> once I walked up on him he tried to come out of the bushes and he was coming toward me and I felt he was going to try to hit me and knock me down and either try to get away or either we were going to tangle or whatever.

(R. 35-36). Kidd acknowledged, nevertheless, that despite this previous "attempt to physically harm a police officer," Kidd did not believe at the time he shot Darryl that Darryl was likely to harm Kidd or anyone else if he was not stopped. (K. 84).

It turned out that the citizen's report had been incorrect; a burglary had not been in progress at 614 W. Fairview

Avenue. (R. 77). Sharon Brown's mother swore out a complaint against Darryl for statutory rape (P. 32-33; R. 77), see Ala. Code §13A-6-2 (1975) (rape in second degree), but a grand jury refused to return an indictment, and Darryl was not prosecuted (P. 32; R. 77).

SUMMARY OF ARGUMENT

Serious questions exist concerning the Court's jurisdiction to hear the State's and Attorney General Graddick's petition. The City of Montgomery has not petitioned for review in this Court. The only interest of the State and the Attorney General in this case is in the Court's determining an abstract question of law, since the State cannot be liable for damages, see Quern v. Jordan, 440 U.S. 332 (1979), nor enjoined by respondent, see Los Angeles v. Lyons, --- U.S. ---, 75 L.Ed.2d 675 (1983). Because respondent

seeks no relief against the intervenors, there is no Article III "case or controversy" between petitioners and respondent.

Although petitioners suggest that Garner and the instant case are virtually identical, each presenting a single pure issue of constitutional law, there are in fact at least two potentially dispositive, nonconstitutional questions present in this case. These other issues are not raised by the State's and Attorney General Graddick's petition because these intervenors lack standing to raise them. 28 U.S.C. §2403(b) (intervention limited to "proper prosecution of the facts and laws relating to the question of constitutionality" of statute at issue). Thus, in its present posture, the Court would be unable to resolve the case on these dispositive nonconstitutional grounds if the case reaches the Court as a

result of the petition. "[F]ew propositions are better established than that constitutional adjudication should be avoided whenever possible." Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 506 (9th Cir. 1979).

Petitioners urge the Court to grant a writ of certiorari in advance of judgment in the court of appeals so that this case may be considered in connection with Tennessee v. Garner, Nos. 83-1035, 83-1070 (argued Oct. 30, 1984). As petitioners acknowledge, the relief they seek "is an extraordinary departure from normal [appellate] procedure and [is] permitted only in extraordinary circumstances." Pet. at 21; see Rule 18, Rules of the Supreme Court. Such extraordinary circumstances are not present here. Considering this case along with Garner would neither assist the Court in its resolution of the

constitutional question raised in Garner nor expedite a decision of the constitutional issue petitioners seek to raise here.

REASONS FOR DENYING THE WRIT

I.

THE COURT LACKS JURISDICTION TO HEAR THE CONSTITUTIONAL ISSUE RAISED BY PETITIONERS

The City of Montgomery, the appellant below, is not a petitioner in this Court. Only the statutory intervenors, the State of Alabama and its Attorney General, Mr. Charles A. Graddick, have asked the Court to issue a writ in advance of judgment in the court of appeals. As a result, a serious question exists concerning whether this Court has jurisdiction to hear the issue raised in the petition. Cf. Graddick v. Newman, 453 U.S. 928 (1981).

The court of appeals permitted the State and Mr. Graddick to intervene in this case pursuant to 28 U.S.C. §2403(b),

which bestows upon a state the right to appear in cases in which the constitutionality of one of its enactments is drawn into question. The statute limits a state's participation in such cases, however, to defending the constitutionality of the challenged enactment. 28 U.S.C. § 2403(b). Under the statute, petitioners are not parties in the full sense, but "only to the extent necessary for a proper presentation of the facts and the law relating to the question of constitutionality." Id.

Respondent submits that there is in fact no Article III "case or controversy" between petitioners and respondent. Respondent has not sought, and it cannot seek, any relief against the State of Alabama or Attorney General Graddick. See Los Angeles v. Lyons, --- U.S. ---, 75 L.Ed.2d 675 (1983); Quern v. Jordan, 440

U.S. 332 (1979). The district court granted no such relief. Petitioners, therefore, lack standing to seek review in this Court of the district court's decision.

There is no indication that Congress intended to authorize intervenors under 28 U.S.C. §2403(b) to petition in this Court for certiorari in cases in which there is no Article III "case or controversy" between the respondents and them. 28 U.S.C. §2403(b) (state shall have rights of a party "subject to ... applicable provisions of law"). Even if it so intended, Congress could not in light of Article III's "case or controversy" requirement constitutionally authorize the Court to hear such petitions from §2403(b) intervenors.[8]

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[8] The issue of §2403(b) intervenors' right to take appeals in this Court is of little moment in a case such as Garner, in

If the City and respondent had resolved their differences and settled the case, the State and Attorney General Graddick could not petition this Court to determine as an abstract matter the constitutional question raised by them here. Cf. Muskrat v. United States, 219 U.S. 246 (1911). That the State

> has a strong interest in obtaining a ruling on this question ... may be so, but the desirability of an advisory opinion is not a substitute for justiciability .... There is a

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which the defendant below as well as the §2403(b) intervenors sought and obtained review in this Court. In such a case, parties with an Article III "case or controversy" have come before the Court, and the state-intervenors' participation in the case raises no question of constitutional dimensions. In this case, however, in which neither plaintiff nor defendant has sought review in this Court, the constitutional issue must be addressed before the Court renders any decision on the substantive issue raised by petitioners.

> difference between permitting the [Government] to play an active role during the pendency of private litigation, and permitting it to go forward with the litigation in its own right after the private parties have composed their differences. To do the latter, ... the Government must possess some independent basis as a party apart from its status as intervenor under the ... statute[] in question.

Ruotolo v. Ruotolo, 572 F.2d 336, 338-39 (1st Cir. 1978)(referring to intervention by the United States under §2403(a)). Although the parties in this case have not settled, the opinion sought by the State and the Attorney General is no less advisory, as was widely noted by commentators at the time of the enactment of §2403:[9]

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[9]Section 2403 is a surviving remnant of the New Deal court-packing bill. See Legislation, 51 Harv.L.Rev. 148 (1937); Legislation, Revision of Procedure in Constitutional Litigation: The Act of 1937, 38 Colum.L.Rev. 151 (1938).

> [I]nsofar as the Act permits the United States to appeal from a decision to which it could not otherwise have been a party, serious constitutional questions will probably be raised.... [T]he original parties ... could decline to appeal. [A] challenge to the Court's jurisdiction would present the question whether the Attorney General has sufficient interest to permit him to appeal alone. The Court has consistently refused to adjudicate abstract questions, or questions which are or have become moot, or which do not permit of a decree or judgment, holding such cases beyond its constitutional powers under Article III of the Constitution. Should the appeal of the Attorney General be heard without the Court permitting itself to rule on the rest of the decision of the lower court, since no judgment or decree would run against the government, there would be no issue in the upper court except the abstract question of the constitutionality of the statute.

Legislation, 51 Harv.L.Rev. 148, 149-50 (1937) (footnotes omitted); see also Legislation, Revision of Procedure in Constitutional Litigation: The Act of 1937, 38 Colum.L.Rev. 153, 159-60 (1938).

The existence in this case of a novel jurisdictional question strongly counsels against this Court's granting the State's and Attorney General Graddick's petition. The Court would have to consider a dispute over jurisdiction of constitutional dimensions, the resolution of which would serve little if any practical purpose. In addition, the necessity for addressing this jurisdictional matter would likely prevent an expedited review of the case and delay a decision until well after the Court issues its decision in Garner, obviating any benefit from granting certiorari before judgment in the court of appeals.

II.

IT WOULD BE IMPROVIDENT FOR THE COURT TO GRANT CERTIORARI WHEN THE COURT OF APPEALS MAY OBVIATE THE NEED FOR A CONSTITUTIONAL DECISION BY RULING ON NONCONSTITUTIONAL GROUNDS NOT PRESENTED BY THE PETITION

The petitioners contend that this case presents only one legal issue, the constitutionality of Alabama's law governing the use of deadly force. While this is, indeed, the only issue that petitioners are permitted to address under 28 U.S.C. §2403(b), it is not the only issue presented by this case. In fact, this constitutional issue is unlikely to be the dispositive primary focus of the appeal now pending.

Both the appellant City and the respondent Pruitt intend to argue in the court of appeals that the court need not reach the constitutionality of the City of Montgomery's shooting policy in deciding the instant case. As noted above, the issue of liability in this case was decided on summary judgment. In its opposition to respondent's motion for a stay of proceedings in the court of appeals, the City argued that the primary

issue on appeal is whether there are genuine issues of fact in this case precluding summary judgment:

> The appeal involves not only a a question of the constitutionality of the Fleeing Felon Law but whether or not it was proper to grant a Motion for Summary Judgment in light of the Defendant Kidd's repeated assertions that at the time he shot the Plaintiff he was in fear for his life...
>
> The question of whether or not the Fleeing Felon Law is constitutional is important in the case but is not going to be the deciding factor.

Response to Motion to Stay, ¶2.

The court found on the evidence as a whole that no genuine issue existed concerning whether Kidd reasonably believed that respondent was dangerous when Kidd shot him. (R. 93). If the court of appeals holds that this finding by the district court was erroneous, then it will have no occasion to address the constitutional issue raised here by

petitioner. The case will be remanded to the district court for a trial on respondent's constitutional and pendent state law claims. If the jury then finds for respondent on his state law claims, or if it finds for the defendants, there will be no need to decide the issue of the constitutionality of the City's shooting policy.[10]

Similarly, respondent intends to argue that the court of appeals need not address the constitutional issue because the district court's summary judgment is supported not only by respondent's constitutional theory, but also by his state law theory. Kidd admitted that he knew that the two "accomplices" were

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[10]The City also intends to complain on appeal of the district court's conduct of the trial on damages, which resulted in a $100,000 verdict for respondent. As the City stated in its opposition to the motion for a stay, it intends to challenge

already in custody (K. 17-18), a fact that petitioners concede, Pet. at 12. Thus, Kidd's conduct was unlawful under the common law rule, codified in Alabama Code §13A-3-27 (1975), because it was neither necessary nor reasonable for Kidd to shoot respondent in order to secure his capture.[11] *See Union Indemnity Co. v. Webster*; 218 Ala. 468, 118 So. 794 (1928); *see also* Ala. Code §13-A-3-27(1975). Kidd and his fellow officers could have interrogated the two suspects in custody in order to determine respondent's identity and locate him for arrest.

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on appeal "the granting of various motions in limine" as well as the court's failure to allow the trial of respondent's pendent state claims at the same time it tried the issue of damages. Response to Motion to Stay ¶2.

[11] Under Alabama law, respondeat superior applies and the City of Montgomery is liable to respondent if Kidd used excessive force in arresting respondent. *City of Birmingham v. Thompson*, 404 So.2d 589 (Ala. 1981).

Other alternatives short of deadly force, which under state law must first be exhausted, also were available.[12]

Because the appeal pending below thus presents a number of dispositive legal

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[12]For example, Kidd, based upon his knowledge of the terrain, believed that respondent was planning to exit the area behind 614 W. Fairview Avenue at a point near an electric power station abutting an intersecting street (K. 36, 39, 50-51); he therefore could have directed the other police units present and converging on the scene to intercept the respondent when he exited the wooded area and, by massing a force at this location, to convince him to surrender. (K. 54-57). Kidd acknowledged in his deposition that he had been trained to employ such a tactic in similar circumstances. (K. 21-24, 27-28, 42-44). Kidd was aware when he shot respondent both that there were at least two other police units in cars already present and that other units were speeding to the scene. (K. 25,27-28, 30-31). Kidd was equipped with a walkie-talkie (K. 18), was in continuous radio contact with the other units (K. 22-23, 54), and could easily have followed this procedure. In his deposition, Kidd offered no explanation for his failure to employ this practice, designed to provide an effective alternative to the use of deadly force in circumstances such as those presented here.

questions that may obviate the need for either this Court or the court of appeals to render an opinion on the constitutionality of Montgomery's deadly force policy, it would be improvident for the Court to grant a writ of certiorari before judgment as requested by the petitioners. "[F]ew propositions are better established than that constitutional adjudication should be avoided whenever possible. Bowen v. United States, 422 U.S. 916 ... (1975); Ashwander v. TVA, 297 U.S. 288 ... (1936)(Brandeis, J., concurring)." Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 506 (9th Cir. 1979). The intervenors' petition urges this Court to rush headlong into an untimely and unnecessary constitutional decision. The Court should decline petitioners' invitation.

III.

THERE ARE NO CIRCUMSTANCES THAT JUSTIFY THE EXTRAORDINARY DEPARTURE FROM NORMAL APPELLATE PRACTICE SOUGHT BY PETITIONERS

A. The Constitutional Question Presented in the Petition Does Not Require the Immediate Attention of this Court.

A petition for certiorari to review a case pending in the court of appeals should be "granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Rule 18, Rules of the Supreme Court. Petitioners argue that the instant case meets the criterion of the rule because the decision below has "left Alabama officers with no practical rule to guide them in the use of force" and has severely hampered "the State of Alabama's ability to protect the public." Pet. at 24. Accordingly, petitioners contend, it

is necessary that there be an immediate resolution by this Court of the constitutionality of the City of Montgomery's deadly force policy.

Contrary to petitioners' assertions, the district court's opinion provides a workable rule, not based on hindsight, to guide Alabama law enforcement officials in the use of deadly force. The district court's opinion makes clear that a police officer may use deadly force after making three determinations: first, that there is probable cause to believe that the suspect has committed a felony; second, that the use of deadly force is necessary to secure the suspect's arrest; and third, that the suspect is likely to physically harm the officer or another person if he is not immediately captured. The rule is clear and, like the common law rule, focuses on the officer's subjective state of mind at the time he makes the difficult

decision whether or not to shoot. If the officer has reason to believe that the use of deadly force is necessary to effect an arrest and that the fleeing suspect is dangerous, he is permitted to shoot. The officer is not liable if it later develops that the officer's reasonable belief was mistaken.[13] The rule does not permit a court or jury to second-guess the officer or to hold him liable as a result of "the use of hindsight in [an] after-the-fact review of the [officer's] decisions." Pet. at 20.

The rule does not, as petitioners imply, ask police officers to make determinations beyond their abilities. Under the common law, an officer must

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[13] For example, officer Kidd in this case mistakenly believed that respondent had committed a burglary. Respondent does not contend that Kidd's belief that a burglary was in progress was unreasonable.

already determine before shooting that a felony has occurred and that the use of deadly force is necessary. The district court's rule requires merely that the officer make an additional determination before he shoots, namely, that the suspect is likely to inflict injury if not immediately subdued. Like the first two assessments, this final determination is subjective, but it is one that law enforcement officers are uniquely qualified to make. Moreover, it is one that officers routinely make in the course of their work.[14] Model Penal Code §3.07

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[14] In fact, law enforcement officers rarely shoot a suspect whom they do not believe is dangerous, even when they are authorized by law or regulation to do so. This is true of officers in the Montgomery police department, as well as officers in other law enforcement agencies. Few officers wish to live with having killed a petty, often youthful, offender committing an offense for which he was unlikely to be imprisoned. Cf. A. Cohen, I've Killed That Man 10,000 Times, 3 Police 17 (1980).

Comments at 60 (Proposed Official Draft 1962). That the rule enunciated by the district court is workable is demonstrated by the fact that the rule, or some variation of it, is the law in approximately one-half of the states. Brief of Appellee-Respondent at 86, Tennessee v. Garner, Nos. 83-1035, 83-1070 (argued Oct. 30, 1984). In addition, most major law enforcement agencies in states that have not adopted the rule nonetheless restrict their officers' use of deadly force to situations in which such force is necessary to prevent death or serious bodily injury. See K. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police (National Institute of Justice 1982). For example, the State of Alabama's three largest law enforcement forces -- the Alabama State Troopers, and the police departments of the cities of Birmingham and Mobile - by

regulation limit the use of deadly force to such situations. Alabama Dept. of Public Safety, Rules and Regulations, Order No. 4 (Jan. 1, 1981); Birmingham Police Dept., General Order 1-78 (July 7, 1980); Mobile Police Department, Procedural General Order #14-B (Sept. 6, 1982). Such regulations are motivated not only by a concern that officers spare the lives of petty criminals and innocent citizens, but also by a concern for the safety of their own officers. These agencies' statistics show that shootings and deaths of police officers decline when officers' use of deadly force is closely regulated. See, e.g., J. Fyfe, Administrative Interventions on Police Shooting Discretion: An Empirical Examination, 7 J.Crim.Just. 309 (1979).

Petitioners contend that the common law rule must be maintained because even

an unarmed suspect running from a police officer presents a danger to an officer and therefore the officer should be free to use deadly force to arrest him. Petitioners argue that an officer places his life in danger when he pursues and physically subdues a fleeing suspect. Whenever a physical confrontation develops, petitioners assert, a suspect may seize an officer's weapon and seriously injure him. Thus, an officer should be free to shoot even an unarmed fleeing suspect rather than give chase in order to avoid harm to himself.

Petitioners' argument reflects a disturbing misunderstanding of both the Alabama statute and the common law. According to petitioners, a police officer may shoot a fleeing suspect when the officer believes he can pursue and catch the suspect by nondeadly means. But that

is precisely what the common law forbids.[15] At common law a police officer may shoot a fleeing suspect only when he believes that pursuit and physical confrontation will not secure the suspect's arrest. Indeed, in Alabama an officer who shoots a suspect despite a reasonable belief that he could capture the suspect after pursuit would be subject not only to civil liability, Union Indemnity Co. v. Webster, 218 Ala. 468, 118 So. 794 (1928), but to criminal prosecution as well, Suell v. Derricott, 161 Ala. 259, 49 So. 895 (1909).[16]

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[15] Petitioners' rationale is also at odds with the common law for another reason. It would justify the shooting of fleeing misdemeanants who, after all, are just as capable of seizing an officer's weapon.

[16] Petitioners imply that Kidd did not pursue respondent because Kidd feared for his life should a physical confrontation ensue between Kidd and respondent. This version of the facts is flatly contradicted by Kidd's own testimony:

While it is true that officers may be harmed when trying to physically subdue resisting suspects, it is likewise true, as noted above, that in actual practice petitioners' fears do not come to pass; the rule enunciated by the district court in fact results in greater officer safety. Experience has shown that rules restricting deadly force encourage good police work, thus reducing the risk to police officers of serious injury or death. See, e.g., J. Fyfe, Administrative Interventions on Police Shooting Discretion: An Empirical Examination, 7 J. Crim.Just. 309 (1979). For example, if

> I ... made my decision once I initially ran those few steps and saw that I was not going to catch up with the subject. That's when I had to make the decision whether to fire or not to fire.

(K. 52-53).

the court's rule had been in effect in the instant case, Kidd might have chosen to radio the other police units present and converging on the scene in order to direct them to mass at respondent's anticipated exit point, where they could have captured him or continued to pursue him.[17] Kidd endangered himself by not involving other officers in respondent's arrest. He also endangered his fellow officers by shooting without knowing whether other officers were present in the area behind 614 W. Fairview Avenue. (R. 31-32, 50-51).[18] Broad discretion to use deadly force tends to encourage law enforcement officers to

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[17] The first rule of police work is to mass numbers of police officers at a crime scene when possible, both to protect one another and to display sufficient force to persuade the suspect to surrender without resistance.

[18] He also, of course, nearly took the life of an innocent 18-year-old man.

depart from sound police practice, thereby increasing the risk of injury to themselves, their fellow officers, bystanders, and arrestees.

B. Granting Certiorari in this Case will not Expedite the Resolution of the Constitutional Issue Raised by Petitioners.

Petitioners seek a writ of certiorari in order to expedite a judicial resolution of the constitutionality of Montgomery's deadly force policy. But the Court's issuing a writ will not in fact expedite the resolution of this issue. When this Court decides Garner, the court of appeals will apply that ruling to this case. If this Court decides that Tennessee's statute is unconstitutional, it will be plain that the City of Montgomery's deadly force policy is unconstitutional as well. And if this Court decides that it is permissible for police officers to use deadly force to arrest fleeing suspects

whom the police do not believe to be dangerous, it will be obvious that the City of Montgomery's policy is lawful. Permitting the case to follow normal appellate procedure will result in at least as swift a judicial determination as would review by this Court.[19]

Petitioners have never suggested that hearing this case would help the Court in considering Garner. And there is no reason to believe that it would have such an effect. What petitioners seek in essence is to intervene in the Garner litigation. Petitioners apparently neglected to request permission to file an amicus brief in Garner; they are now trying to file

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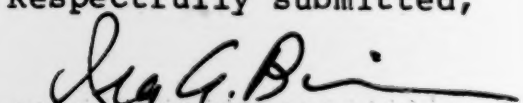
[19] If the court of appeals finds it is unnecessary to address the constitutional issue because nonconstitutional questions are dispositive, needless constitutional litigation will have been avoided. Yet, the State and Attorney General will have a resolution of the constitutional issue as a result of the Court's decision in Garner.

such a brief in the guise of a petition for review of the instant case before judgment below. The petition for a writ of certiorari before judgment in the court of appeals should be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny the State of Alabama's and Attorney General Graddick's petition for a writ of certiorari before final judgment in the U.S. Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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